88-904

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHNSON MOVING AND STORAGE COMPANY,
Petitioner

v.

EDWARD H. DANIELS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF COLORADO

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20pp

QUESTIONS PRESENTED

I. Whether the Interstate Commerce Commission Regulation Ex Parte No. 311 requiring motor carriers to roll-in surcharges in their rate structure to compensate owner/operator truck drivers for increased fuel costs, entitled the owner/operator to the full amount of the surcharge as additional compensation; or was the owner/operator limited to extra compensation for added fuel costs based on miles driven.

II. Whether the lower court allowed double recovery by determining the plaintiff's entitlement to the full amount of the fuel surcharge as mandated by Ex Parte No. 311 and also an increased percentage of total line haul revenue based on the rolled-in surcharge.

Johnson Storage and Moving Company, a Colorado corporation, has no subsidiaries nor parent companies; however, it does have affiliates with United Van Lines, Inc., a Missouri corporation; Johnson Intermodal Systems, Inc., a Colorado corporation; Johnson Storage and Moving Company, Inc., a Wyoming corporation; King Investments, Inc., a Colorado corporation; Johnson Pikes Peak, Inc., a Colorado corporation; Johnsons of Cherry Creek, Inc., a Colorado corporation; and Custom Truck, Inc., a Colorado corporation.

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OTHER AUTHORITIES:

Regulation Ex Parte No. 311 (Sub - No. 4) "Modification of the Rate Carrier's Fuel Surcharge Program" 46 Fed. Reg. 50070; 54746; 47 F.R. 4689; 365 ICC 311 (decided Oct. 5, 1981) 2,3,4,5,6

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF COLORADO

Petitioner, Johnson Moving and Storage Company respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Colorado entered in this matter on August 22, 1988.

OPINIONS BELOW

The October 3, 1985 Findings and Conclusions of the District Court, City and County of Denver, State of Colorado, Honorable Paul A. Markson, Jr. entering judgment in the amount of $10,498.28 against Johnson Moving and Storage Company, is not reported and appears in Appendix at A-1-A-4. The February 25, 1988, Opinion affirming the ruling of Judge Markson, Jr. which Johnson Moving and

Storage Company seeks to have this Court review, is not yet officially reported and appears in the Appendix at A-5-A-6. The August 22, 1988, Order of the Colorado Supreme Court denying the Petition of Writ of Certiorari to the Colorado Court of Appeals appears in the Appendix at A-7.

JURISDICTION

The judgment of the Supreme Court, State of Colorado was entered August 22, 1988 and this petition was filed within ninety (90) days of that date. The statutory provision which confers jurisdiction of this Court to review the judgment of the Supreme Court, State of Colorado by Writ of Certiorari is 28 U.S.C. 1257.

RELEVANT STATUTORY PROVISIONS

Interstate Commerce Commission, Regulation Ex Parte No. 311 (Sub - No. 4), "Modification of the Rate Carrier's Fuel Surcharge Program," 46 Fed. Reg. 50070; 54746; 47 F.R. 4689; 365 ICC 311 (decided October 5, 1981; effective February 12, 1982). The pertinent text of the regulation is set forth as follows:

> "... Option A, in the decision of April 11, 1980, may provide the best answer. A mileage compensation formula resulting in a mandatory cents-per-miles payment by carriers to all owner-operators will be utilized. As described below, this approach would establish a reimbursement mechanism keyed to average owner-operator fuel costs rather than the revenue of a given shipment. The method will be easy to apply. The Commission will publish and otherwise make available a cents-per-mile figure which will reimburse owner-operators for fuel costs in excess of 63.5 cents a gallon."

Regulation Ex Parte No. 311 (page 23-419) provides, in part as follows:

> "Dual Compensation
>
> In the prior decision, we noted that parties may modify leases to provide for 100 percent retention by the carriers of any Ex Parte No. 311 fuel-related rate increases. Carriers establishing rates in the future which will not be subject to a surcharge fold in may minimize dual compensation problems by treating the initial fuel payment to the owner-operator as the equivalent of the fold-in amount and deduct it to calculate gross revenues. Either of the approaches contained in the decision can then be applied to subsequent fuel and non-fuel related increases. A similar procedure may be used if carriers have previously folded in the fuel surcharge."

STATEMENT OF THE CASE

This case presents important issues as to the interpretation of Interstate Commerce Commission ("ICC") Regulation Ex Parte No. 311, Modification of the Motor Carrier Fuel Surcharge Program.

In 1979, the ICC, in response to a nationwide truckers' strike, passed a fuel surcharge regulation. This added tax permitted truckers to recover additional compensation (18% of the total line haul charge) to reimburse themselves for added fuel costs. Several months after the surcharge was initiated, it became clear to the ICC that the surcharge had no real relation to actual fuel costs and adopted another method of compensation, Ex Parte No. 311. The new regulation required household moving companies, including Johnson Moving and Storage Company ("Johnson"), to collect an additional amount of 9.4% from its shippers, which amount was placed in a pool for the payment of a

mileage charge to its drivers. Plaintiff Edward H. Daniels, as a contract hauler with Johnson, was paid under the dictates of Ex Parte No. 311 until his termination in November of 1982.

Following his termination, Mr. Daniels filed suit claiming that his hauling contract with Johnson entitled him to all of the 9.4% collected, plus the mileage allowance. In a second claim, he alleged that the 9.4% should have been added to the total line haul revenue before his portion of the line haul revenue was determined.

Following a trial to the court, judgment was entered awarding Mr. Daniels:

a. 100% of the 9.4% added surcharge tax less what he had already received as a mileage allowance; and

b. the 9.4% surcharge should be added to the amount of the gross revenue before applying Daniels' percentage of 56.35 to the line haul charge.

The Decision of the lower court and the affirmation at the appellate level was erroneous for two reasons. The decision was not in conformity with the intent or purpose of Ex Parte No. 311 and the decision allowed Mr. Daniels double recovery for mileage reimbursement.

Johnson then filed an appeal to the Colorado Court of Appeals. The Colorado Court of Appeals affirmed the claim of Daniels and a Petition for Certiorari was filed in the Supreme Court of the State of Colorado which was denied on August 22, 1988.

REASONS FOR GRANTING THE WRIT

I. The decision below affirming an award of additional mileage conflicts with the mileage reimbursement requirements of Ex Parte No. 311.

Regulation Ex Parte No. 311 provided a reimbursement for owner/operators on a mileage basis. The rate of reimbursement was originally set at 14 per mile and was designed to assure owner/operators compensation for all fuel costs above 63.5 per gallon. This additional compensation was to be paid from the 9.4% collected by the company as an addition to the total line haul revenue.

The decision below allowing Mr. Daniels the total 9.4% of the additional line haul revenue conflicts with the regulation. The intent of the regulation was not to add the 9.4% to the compensation due the owner/operator, but to use said amount to establish a fund to pay drivers for miles driven. Johnson was not required to pay Mr. Daniels the 9.4% and also an additional percentage of the line haul revenue. The ruling of the court requiring this compensation constitutes double recovery.

II. The decision below conflicts with the decision of *Central Forwarding, Inc. v. I.C.C.*

In *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266 (5th Cir. 1983), the Court held that the Interstate Commerce Commission exceeded its statutory authority in promulgating Regulation Ex Parte No. 311. Although the ruling did not have retroactive effect, the Court set aside Regulation Ex Parte No. 311 as enacted by the Interstate Commerce Commission.

III. **The decision below conflicts with the decision of *International Brotherhood of Teamsters, et al v. Dixie Transport Co., et al*.**

In *International Brotherhood of Teamsters, et al v. Dixie Transport Co., et al*, 1984 Federal Carriers Cases, ¶37,109 (I.C.C. Rev. B. June 20, 1984), the review board, in interpreting Ex Parte No. 311, determined that owner/operators were not entitled to the amount of the increase in the line haul revenue (surcharge) which was rolled into the base rate. Rather the owner/operators were only entitled to reim bursement of fuel costs based on miles driven.

CONCLUSION

For the foregoing reasons this Court should grant a Writ of Certiorari to review the issues presented by this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were served by postage prepaid first-class mail on Paul Kram, Esq., counsel for the respondent, on November 17, 1988. I further certify that all parties required to be served have been served.

/s/ Lynn W. Toedte

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Attorney for Petitioner
Johnson Moving and Storage Company

IN THE DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

Civil Action No. 84 CV 1143

MEMORANDUM ENTERED: OCTOBER 3, 1985

MARKSON, JR., PAUL A.

A trial to the Court was held July 24, 1985. Following are the Court's Findings of Fact and Conclusions of Law.

1. On January 2, 1981, Plaintiff, a long-haul trucker, and Defendant, an agent of United Van Lines engaged in the cross-country and local moving business, entered into a contract whereby Plaintiff would haul goods for Defendant in exchange for a percentage of the "line haul revenue" generated by Plaintiff and 100% of any "additional tariff items".

2. From January 2, 1981 until April 13, 1982, Plaintiff received an 18% "revenue based fuel surcharge" as mandated by the Interstate Commerce Commission to compensate in dependent contract truckers for their extremely high fuel costs caused by the oil crisis. The fuel surcharge was determined by multiplying 18% times the line haul revenue charge and 100% of it was paid to Plaintiff by Defendant as an additional tariff item.

3. As of April 13, 1982, Regulation Ex Parte No. 311, *Modification of the Motor Carrier Fuel Surcharge Program*

was initiated by the I.C.C. This program changed the existing method of payment to a mileage based method and allowed the shipping companies and their agents to assess the I.C.C.-revenue based fuel surcharge on the line haul revenue paid by the customers.

4. United Van Lines and its agents, including the Defendant, received an authorization from the I.C.C. under Ex Parte No. 311 to assess a 9.4% fuel surcharge on line haul revenues.

5. The Plaintiff's contract with Defendant was ter minated on November 22, 1982. Between April 13, 1982 and November 22, 1982 th Defendant assessed its customers the line haul revenue figure including the 9.4% fuel surcharge. The amount of surcharge on the line haul revenue generated by Plaintiff between these dates is $9,492.98 (gross revenue of $110,000 x 9.4% $9,492.98). The Defendant paid Plaintiff at a rate of 13 per mile during this period or a total of $4,773.02. If the 9.4% assessment is an additional tariff item, Defendant owes Plaintiff 100% of all additional tariff items of $9,492.98 less $4,773.02.

6. The I.C.C. recognized that its new fuel reimburse ment plan might have the effect of double reimbursement for independent contract truckers who, as the Plaintiff, were paid under percentage-or-revenue contracts and suggested modifica tion of such contracts. United Van Lines instructed all of its agents, including the Defendant, to consider modifying their independent contract trucker contract to implement Ex Parte No. 311's provisions. The Defendant took no steps whatever to modify its contract with Plaintiff. It instead unilaterally reduced Plaintiff's

compensation by "backing-out" the surcharge from Plaintiff's total line haul revenue prior to determining Plaintiff's percentage of line haul revenue compensation.

7. Between April 13, 1982 and November 22, 1982, Plaintiff generated a total line haul revenue of $110,511.97 and his contractual share of the line haul revenue was $64,444.77. The Defendant, however, "backed-out" the fuel surcharge under Ex Parte No. 311 prior to figuring the Plain tiff's percentage of line haul revenue. Accordingly, Plain tiff was only paid $58,666.45.

8. Pursuant to paragraph XVIII (b) of the contract, Plaintiff's compensation could not be reduced without his written consent. He gave no written consent and did complain prior to his termination that he was not receiving total compensation.

9. Paragraph IX of the contract provided for an escrow account paid by Plaintiff and held by Defendant to insure all payments by Plaintiff owed to Defendant. Any excess held by Defendant had to be returned to Plaintiff no later than the date when all paperwork required by Defendant had been sup plied by Plaintiff. Plaintiff supplied a final accounting to Defendant on February 3, 1983 and Defendant sent its final accounting check to Plaintiff on February 16, 1983. Original ly the contract provided for an escrow of $1,000.00; but Defendant, after posting and mailing notice to all drivers, increased the escrow to $2,000.00. Interest pursuant to the contract was to be paid once the escrow account reached the "required sum". Plaintiff was paid $80.00 of interest upon final accounting.

10. Exhibit E is Defendant's tabulation for final account-

ing. With the exception of item /9 (discussed below), Plaintiff did not sustain his burden of establishing that the deductions complained of were unauthorized. On the other hand, Defendant's testimony was more convincing that the deductions made were in fact incurred while the Defendant was employed and were authorized by the contract. With regard to /9, although the Plaintiff had been injured, Defendant had hauls available for the truck and Plaintiff did not make the truck available for use during the period in question.

11. By stipulation, Plaintiff owes Defendant $1,020.00 on Defendant's counterclaim.

Based upon these facts the Court makes the following Conclusions of Law.

1. The 9.4% fuel surcharge mandated by Ex Parte No. 311 was an additional tariff item for which Defendant was liable to Plaintiff at 100% pursuant to the contract. The Plaintiff was paid the minimum 13 a mile figure, but Defen dant breached its contract with Plaintiff by failing to pay the entire amount. Such breach was material, and Plaintiff was damaged in the amount of $4,719.96.

2. In "backing-out" the surcharge from Plaintiff's total line haul revenues prior to determining Plaintiff's percentage of compensation, the Defendant failed to adequately compensate the Plaintiff under the contract. This was a material breach of the contract which damaged Plaintiff in the amount of $5,778.32.

3. The Court is fully cognizant of Defendant's argu ment that the Court's conclusions result in compensation over and above that contemplated by the I.C.C. Such a result,

however, was anticipated by the I.C.C. and United Van Lines, and they took steps to warn Defendant of this eventuality. Defendant ignored these warnings, implemented procedures adopted by the industry under Ex Parte No. 311, but did not modify its percentage-of-revenue contract with Plaintiff thereby reducing Plaintiff's compensation without Plaintiff's written approval.

4. Defendant accurately determined the interest owing on Plaintiff's escrow account. The increase of the escrow from $1,000.00 to $2,000.00, after notice, did not amount to a decrease in Plaintiff's "compensation" as that term is used in paragraph XVIII (b). "Compensation" as that term is used in the contract is the amount of money established by the "com pensation schedule" attached to the contract. The Defendant also accurately calculated the amount of refund due in its final accounting. This was done in a timely manner.

5. Plaintiff owes Defendant $1,020.00 on its counter claim.

Therefore, Judgment will enter for the Plaintiff and against the Defendant on his First and Second Claim For Relief in the sum of $5,778.32 and $4,719.96 respectively. Judgment will enter for the Defendant and against Plaintiff on Plain tiff's Third and Fourth Claims For Relief and for the Defen dant and against the Plaintiff on its Counterclaim for $1,020.00. Setting-off $1,020.00 against the total of $10,498.28, Defendant owes Plaintiff $9,478.28.

COLORADO COURT OF APPEALS

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

No. 85CA1500

OPINION ENTERED: FEBRUARY 25, 1988

DIVISION II — JUDGEMENT AFFIRMED

Opinion by JUDGE SMITH

Kelly and Metzger, JJ., concur

Defendant, Johnson Moving and Storage Company, appeals the judgment entered in favor of plaintiff, Edward H. Daniels, following trial to the court on plaintiff's breach of contract claim. We affirm.

Here, the findings of fact and conclusions of law made by the court are based on competent evidence and are therefore binding on appeal. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The court's determination that the fuel surcharge or fuel fold-in was an additional tariff item which the contract required be paid 100 percent to plaintiff is supported by the record. In particular, the fact that defendant continued payment to plaintiff 100 percent of the prior 18 percent "revenue based fuel surcharge" as a tariff item supports this conclusion. Similarly, the contract was only modifiable with the written consent of plaintiff. Therefore, defendant's unilateral act of "backing-out" the fuel surcharge from the line-haul revenue before determining the compensation to

be paid to plaintiff was a material breach. Contrary to defendant's arguments, the I.C.C. recommendations buttress the trial court's findings and conclusions and do not support its contention that it had a lawful excuse for its action.

Accordingly, the judgment is affirmed.

JUDGE KELLY and JUDGE METZGER concur.

IN THE COURT OF APPEALS OF THE STATE OF COLORADO

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

Case Number 85CA1500

ORDER

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 5-23-88, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

BY THE COURT, EN BANC, APRIL 21, 1988.

IN THE SUPREME COURT, STATE OF COLORADO

EDWARD H. DANIELS

v.

JOHNSON MOVING AND STORAGE COMPANY

Case Number 88SC235

ORDER

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS FURTHER ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 22, 1988.

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